

In 2009, we continued our involvement in the proactive projects highlighted in last year's annual report - Enhanced Identification Cards and Enhanced Drivers' Licences, video surveillance by the Winnipeg Police Service in downtown streets and the development of the Manitoba Electronic Health Record. In these and other long term projects, we were invited to provide our comments. The challenge remains for our office to maintain and be seen as maintaining our independence when serving as both an educator and privacy watchdog.

Also in 2009, new initiatives came to our attention where we offered to provide our comments. In these situations, the public bodies we reviewed assisted our involvement and were responsive to our advice.

Our work on two proactive reviews is discussed in this report. We have summarized our comment on the Flin Flon School Division's proposed voluntary drug testing policy because of the interest the proposal generated and because we think our position will be of interest to other Manitoba school divisions. We are also reporting on our ongoing review the Manitoba Enhanced Identification Card and Enhanced Driver's Licence Program to heighten the privacy awareness of those who are considering participating in the program.

Flin Flon School Division's Proposed Voluntary Drug Testing Policy

On April 9, 2009, it came to our attention from media reports that the Flin Flon School Division was considering a division-wide "Drug and Alcohol Use" policy that would apply to the approximately 1300 students of the division. With the full cooperation of the School Division, our office undertook a review and commented on the privacy implications of using the proposed substance detectors.

When the Flin Flon School Division drafted its proposed "Drug and Alcohol Use" policy, there were existing provisions for addressing alcohol and other drug use. Consistent with *The Safe School Charter* of Manitoba, Flin Flon School Division adopted as a Code of Conduct that students are expected to refrain from using, possessing or being under the influence of alcohol or illicit drugs at school. This is reiterated in various school policies within the School Division.

Manitoba's *Education Administration Miscellaneous Provisions Regulation* states that a teacher may suspend a student from the classroom for conduct the teacher considers detrimental to the classroom learning environment or contravenes the school's code of ethics. Also, the principal may suspend from school a student who engages in conduct that the principal considers injurious to the school's welfare or educational purposes. The principal has disciplinary authority over students' conduct at school and on the way to and from school in terms of their conduct towards one another.

When a teacher in the Flin Flon School Division suspects that a student is under the influence of alcohol or an illegal drug, he or she may refer the student to the principal who uses his or her best judgment to determine whether the student is under the influence. We understand that there are no formally established criteria in the School Division for supporting the



determination but indicators would include the odor of alcohol or marijuana on the student, other physical manifestations or behaviour suggestive of substance use and/or the student's admission to being under the influence.

Under the proposed policy that we reviewed, if the student claimed he or she was not under the influence and wanted to provide proof in support of that claim, the student could volunteer to undergo testing with a detection device in the principal's office. We were advised that the use of detectors would not be imposed on a student but rather would be the student's choice.

The School Division advised that under these procedures, the principal would have the use of science to help make the determination that a student was not under the influence, based on objective method rather than opinion. Where the testing device showed a substance to be present, the School Division would interpret that as meaning the student was "under the influence" and would rely and act on that finding.

We were informed that no record of the test would be kept if the test were passed. If the test were not passed, it would be recorded in the student's file that the student was in fact under the influence of alcohol or other drugs. We were advised by the School Division that the student would be suspended as a result. This would be no different from the existing situation where a student was deemed to be under the influence of drugs or alcohol while at school.

For suspected alcohol use, the proposed testing device was one designed to measure a person's blood alcohol concentration at the time the test was taken. The device included a mouthpiece into which the student would blow a moderate, continuous breath sample for six seconds. If alcohol were detected, the device would display the measurement of the student's blood alcohol concentration within eight seconds. This would be shown by the "illumination" of an LED (light emitting diode) meter ranging from a .01% to 0.1% blood alcohol concentration, displayed in .01% increments.

For substances other than alcohol, the proposed testing device was designed to detect identified drugs of abuse in human saliva, specifically cocaine, methamphetamines (including Ecstasy), THC (marijuana), amphetamines, opiates, phencyclidine (PCP or "angel dust") and benzodiazepines. The device consisted of a "collection pad" for obtaining a saliva sample and a display of six test windows that, during a single testing, would provide presumptive results for six drugs. The collection pad would be rubbed inside the mouth in 15-20 circular motions at four separate places -- inside each cheek, on top of the tongue and beneath the tongue. After five minutes, any presence of a coloured band at a particular test window would indicate a negative result for that specific drug. The absence of colour at a window would indicate a presumptive positive result for the drug being tested at that particular window. In either case, a colour band at a "control region" would need to appear to indicate that the test was performed properly. If the control band does not appear, the presumptive test results would be invalid and the test would need to be repeated with a new device. We were advised by the School Division that the device could detect the presence of marijuana from an outer limit of 6-18 hours and for all of the other drugs tested, an outer limit of 2-3 days.



Under PHIA, “personal health information” means recorded information about an identifiable individual that, among other things, relates to the individual’s health. Under PHIA, this information must be collected or maintained by a person or entity defined as a “trustee” under the Act. A School Division is a trustee under PHIA. The first consideration under PHIA was whether, pursuant to the proposed policy, the School Division was collecting personal health information.

The School Division advised that if the blood alcohol testing device showed any blood alcohol concentration reading whatsoever, a written notice would be produced stating that the student was under the influence of alcohol. In our opinion, this would be personal health information under PHIA, being recorded health information about an identifiable individual, in this case the determination of the student having measurable alcohol in his or her blood. In our view, the illumination of the meter on the blood alcohol testing device would not in itself constitute “personal health information” because it would not be a *record* of information.

The School Division advised that if the saliva testing device showed a presumptive positive reading for any of the drugs tested, a written notice would be produced stating that the student was under the influence of a drug or drugs. This recorded information would be personal health information. In our opinion, the result apparent on the device would also be personal health information.

The School Division indicated that substance testing would occur only when a student suspected of being under the influence of a substance chose to submit to testing. There is, however, no provision in PHIA for a person to consent to a trustee’s collection of his or her personal health information. Under PHIA, a trustee can collect personal health information only if it is authorized to do so under the Act. If an individual collected the information himself or herself and then gave it to a trustee, that, too, would be a collection by the trustee which could only lawfully be made if the trustee were authorized to make the collection. Section 13 of PHIA sets out when a trustee is authorized to collect personal health information:

Restrictions on collection

13(1) A trustee shall not collect personal health information about an individual unless

(a) the information is collected for a lawful purpose connected with a function or activity of the trustee; and

(b) the collection of the information is necessary for that purpose.

For our consideration of the proposed policy in relation to clause 13(1)(a) of PHIA, the School Division provided our office with information about its legal obligations for maintaining order and discipline in schools and at school activities. The School Division also advised our office that the basis for the proposed policy was that someone under the influence of alcohol, or other drugs, places their education and that of others at risk. More specifically, we were advised that

Definitions

Supported : Complaint fully supported because the decision was not compliant with the legislation.

Partly Supported: Complaint partly supported because the decision was partly compliant with the legislation.

Not Supported: Complaint not supported at all.

Recommendation Made: All or part of complaint supported and recommendation made after informal procedures prove unsuccessful.

Resolved: Complaint is resolved informally before a finding is reached.

Discontinued : Investigation of complaint stopped by Ombudsman or client.

Declined: Upon making enquiries, complaint not accepted for investigation by Ombudsman, usually for reason of non-jurisdiction or premature complaint.

Completed: Cases conducted under Part 4 of *The Freedom of Information and Protection of Privacy Act* and *The Personal Health Information Act* where the task of auditing, monitoring, informing, or commenting has been concluded.

Pending: Complaint still under investigation as of January 1, 2010.

